UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

VISHAKH and CRYPTONOMIC, INC. Plaintiffs, v. KENNETH T. CUCCINELLI II, ACTING DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES Defendant(s).	X : : : : : : : : : : X	Civil Action No.: 1:19-cv-5173 **COMPLAINT**

The Defendant ("the Agency") decided that a lead application developer focused on cutting edge blockchain technology for decentralized financial infrastructure—such as digital assets and currencies—does not require a college degree. It arrives at this nonsensical position by ignoring Plaintiff's ("Cryptonomic") consistent hiring practices, the hiring practices of other similar companies, and the Department of Labor's own minimum eligibility requirements for such a job at a Wage Level IV. The Agency's decision—that took over 13 months—is arbitrary and defies common sense.

Similarly, the Agency's 26-month delay of Plaintiff's ("Vishakh") application for an immigrant investor visa under 8 U.S.C. § 1153(e)(5) is unreasonable. Most notably, the Agency has fully adjudicated nearly identical applications for other investors in the same project that filed *AFTER* Vishakh. The Agency can make no plausible claim that the delay on adjudicating Vishakh's application is reasonable when it has decided nearly identical applications that post date Vishakh's application.

For these reasons, this Court should set aside the Agency's H-1B Denial, compel action on Vishakh's EB-5 application, and order the Agency to pay reasonable attorney's fees and costs.

PARTIES

1. Plaintiff Cryptonomic, Inc. is a corporation incorporated under the laws of New York with its principal place of business in Brooklyn, New York.

2. Plaintiff Vishakh is a citizen and national of India. He resides in New York City, New York.

3. Defendant Kenneth T. Cuccinelli II, is the Acting Director of United States Citizenship and Immigration Services ("USCIS"). He is in charge of all adjudications and processing for visas or status under 8 U.S.C. § 1101(a)(15)(H) and 8 U.S.C. § 1153(b)(5).

VENUE AND JURISDICTION

4. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

5. Under its federal question jurisdiction, this Court can hear claims under the Administrative Procedure Act (5 U.S.C. § 501, *et seq.*) ("APA").

6. Under the APA, this Court can set aside final agency action and compel unreasonably delayed agency action. 5 U.S.C. §§ 553(b), 706.

7. Under its federal question jurisdiction, this Court can also provide declaratory relief under 28 U.S.C. § 2201.

8. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(A) because Plaintiff Cryptonomic resides in Brooklyn and its principal place of business is in Brooklyn.

9. No statute or regulation requires an administrative appeal of the denial Plaintiff Cryptonomic challenges in this case. Thus, Plaintiff has exhausted all administrative remedies or constructively exhausted all administrative remedies. *Darby v. Cisneros*, 509 U.S. 137 (1993).

LEGAL BACKGROUND

10. Vishakh's immigration history is a case-study in the relationship between non-immigrant and immigrant visa petitions. It reveals a concentrated, intense decades long effort to comply with various aspects of employment and investment-based immigration. Cryptonomic's role in his immigration history reveals the Agency's current policies targeting H-1B Visas. Plaintiffs provide the following legal background to contextualize the facts of this case.

H-1B *Visa Program*

11. Congress allocates 85,000 visas a year to private companies to hire foreign national workers to fill "specialty occupations." *See* 8 U.S.C. § 1184(g).

12. Specialty occupations are those that require, at a minimum, a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

13. Employers who seek to hire foreign nationals to fill specialty occupations must seek a visa under 8 U.S.C. § 1101(a)(15)(H)(i)(B) ("H-1B Visa").

14. The relevant regulation identifies the following as exemplar backgrounds for specialty occupations: "architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts." 8 C.F.R. § 214.2(h)(2)(ii).

15. Employers start the H-1B Visa application process by filing a labor condition application with the U.S. Department of Labor ("DOL"). 8 U.S.C. 1182(n). The employer provides evidence regarding the position, experience, skill level, job duties, and pay for the position. *Id.*

16. Upon approval of the Labor Condition Application, DOL certifies that, by hiring the foreign national employee on terms identified in the Labor Condition Application, the employer will not adversely impact American workers' pay and conditions.

17. The employer then signs the approved Labor Condition Application. By signing the LCA ("LCA"), the employer agrees to submit to DOL's enforcement, investigations, and administrative court system. *Id.* And only the employer that signs the LCA is subject to DOL's jurisdiction and only the employer is liable for any alleged violations. 8 U.S.C. § 1182(n).

18. After receiving an approved LCA and signing it, employers then file an I-129, Petition for Non-Immigrant Worker on behalf of the foreign national employee with United States Citizenship and Immigration Services ("USCIS").

19. The demand for Cap H-1Bs is significant. For example, the chart below reflects the total number of H-1B Visas filed with USCIS from 2013 to 2017:

Fiscal Year	Number of All Cap H-1B Petitions Filed	Number of Cap H-1B Petitions for Beneficiaries with Bachelor's Degrees	Number of Cap H-1B Petitions for Beneficiaries with Advanced Degrees
2013	124,130	93,489	30,641
2014	172,581	132,063	40,518
2015	232,973	182,294	50,724
2016	236,444	166,206	70,238
2017	198,460	111,080	87,380

See Proposed Rule, Registration Requirement for Petitioners Seeking to File H-1B Petitions on Behalf of Cap-Subject Aliens, 83 Fed. Reg. 62406, 62424 Table 7 (Dec. 3, 2018).

20. Because Congress only allocated 85,000 H-1B visas a year, with certain exceptions not relevant here, USCIS conducts a lottery each April to "select" 85,000 petitions. *Id.* at 62411-12. This statutory pool of 85,000 H-1B visas are referred to as "Cap H-1B Visas."

21. Of these 85,000 visas, 65,000 Cap H-1B Visas are available to foreign nationals with a college degree. *See* 8 U.S.C. § 1184(g)(1)(A)(vii). And the remaining 20,000 Cap H-1B Visas

are only available to foreign nationals with master's degrees or higher from a United States, non-profit institute of higher education.

22. If an employer's petition is selected in the lottery, USCIS cashes the petitioner's filing fee checks, receipts the petition, and considers its merits. If approved, a beneficiary can live and work in the United States on their Cap H-1B Visa, generally, for up to 6 years. *See* 8 C.F.R. § 214.2(h)(15(ii)(B) ("The alien's total period of stay may not exceed six years."); 8 U.S.C. § 1184(g)(4).

23. If an employer's petition is not chosen in the Cap H-1B visa lottery, the petition is returned and USCIS does not consider the merits of the petition. And the employer may not apply again for a Cap H-1B until the following fiscal year's lottery, and there are no guarantees the employer will be selected in the next lottery.

24. If an employer's petition is chosen in the lottery, USCIS's then reviews the eligibility for the proposed specialty occupation's job duties and determines whether they require "theoretical and practical application of a body of highly specialized knowledge" that is on a level associated with the attainment of a bachelor's degree or equivalent experience. *See* 8 U.S.C. § 1184(i).

H-1B *Eligibility Criteria*

25. USCIS is charged with determining only whether a proffered position is a "specialty occupation."

26. Congress defined "specialty occupation" as a position that requires a certain level of education or experience:

> (1) . . . the term "specialty occupation" means an occupation that requires—
>
> > (A) theoretical and practical application of a body of highly specialized knowledge, and

> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
>
> (2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are—
>
> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 U.S.C. § 1184(i).

27. USCIS has further interpreted these requirements in its regulations:

> To qualify as a specialty occupation, the position must meet one of the following criteria:
>
> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A).

28. A petitioner need only satisfy one of these elements to demonstrate the position is a specialty occupation.

Length of H-1B Visa and AC21 Extensions

29. If an employer's petition is chosen and the Agency later grants the Cap H-1B Visas, a beneficiary can acquire Cap H-1B Visa status, generally, for up to 6 years. *See* 8 C.F.R. § 214.2(h)(15(ii)(B) ("The alien's total period of stay may not exceed six years."); 8 U.S.C. § 1184(g)(4).

30. In 2002, Congress passed the American Competitiveness in the Twenty-first Century Act of 2000 ("AC21"), Public Law 106-313, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, 116 Stat. 1758 Start Printed Page 82400 (2002).

31. Congress intended AC21 to "improve economic growth and job creation by immediately increasing U.S. access to high-skilled workers." Final Rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398, 82409 (Nov. 18, 2016).

32. One such provision sought to increase employers' continuous access to high tech workers from countries with long waits for immigrant visas. *Id.* Prior to AC21, employers would hire foreign national workers, sponsor their Cap H-1B Visas, and then sponsor an immigrant visa for the same worker. However, after six years in H-1B status, the worker would have to leave the United States to wait for the immigrant visa to be available. This wait could be years long. Thus, employers would lose highly skilled, experienced employees for years while the workers returned home after six years in Cap H-1B Visa status.

33. This problem affected Chinese and Indian nationals primarily. *Id.* ("This provision recognized ''the discriminatory effects of [the per-country limitations] on nationals from certain Asian Pacific nations,'' specifically Chinese and Indian nationals, which ''prevent[ed] an

employer from hiring or sponsoring someone permanently simply because he or she is Chinese or Indian, even though the individual meets all other legal criteria.'')

34. To fix this problem, AC21 mandated one-year extensions for Cap H-1B Visa holders with approved immigrant visa petitions who were waiting for visas to become available:

> AC21 also sought to more generally ameliorate the impact of the lack of employment-based immigrant visas on the high-skilled beneficiaries of approved Form I–140 petitions. Sections 106(a) and (b) of AC21, as amended by section 11030A of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273 (2002), authorized the extension of H– 1B status beyond the statutory 6-year maximum for H–1B nonimmigrant workers who are being sponsored for LPR status by U.S. employers and are subject to lengthy adjudication or processing delays. Specifically, these provisions exempted H–1B nonimmigrant workers from the 6-year limitation on H–1B status contained in INA 214(g)(4), if 365 days or more have elapsed since the filing of a labor certification application (if such certification is required under INA 212(a)(5), 8 U.S.C. 1182(a)(5)), or a Form I–140 petition under INA 203(b), 8 U.S.C. 1153(b). These provisions were intended to allow such high-skilled individuals to remain in the United States as H–1B nonimmigrant workers, rather than being forced to leave the country and disrupt their employers due to a long-pending labor certification application or Form I–140 petition. *See* S. Rep. 260, at 23.

Id.

35. AC21 also improved a Cap H-1B Visa holder's ability to change employers but while maintaining Cap H-1B Visa status and "porting" an approved immigrant visa to a new employer. *Id.*; *see* AC21 § 104(c), P.L. 106-313, 114 Stat. 1253 (Oct. 17, 2000).

36. It is common for nationals of certain countries to be in Cap H-1B Visa Status for years and change employers various times even after they get an approved immigrant visa. Thus, employers or beneficiaries often try to speed up the visa process by applying for immigrant visas with the shortest waiting period.

Immigrant Visa Backlogs

37. The Immigration and Nationality Act limits the number of employment-based immigrant visas that may be issued during any given fiscal year. 8 U.S.C. § 1151(d).

38. The Act then limits the number of employment based visas that nationals of any one single country may acquire during any fiscal year: "the total number of immigrant visas made available to natives of any single foreign state or dependent area . . . in any fiscal year may not exceed 7 percent . . . of the total number of such visas made available under such subsections in that fiscal year." 8 U.S.C. § 1152(a)(2).

39. For nationals of countries that consistently exceed these thresholds, these two caps work in tandem to create significant visa wait times. See Final Rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, 81 Fed. Reg. 82398, 82409 (Nov. 18, 2016) (noting the discriminatory effect these caps have on nationals of China and India).

40. For Indian nationals, immigrant visas are available to foreign nationals with an approved application under 8 U.S.C. § 1153(b)(2) ("EB-2 Visa") if they filed on or before May 08, 2009. September 2019 Visa Bulletin.[1]

41. For Indian nationals, immigrant visas are available to foreign nationals with an approved application under 8 U.S.C. § 1153(b)(5) ("EB-5 Visa") if they filed on or before September 1, 2017. *Id.*

[1] Available at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-september-2019.html (last visited September 10, 2019).

42. Thus, an Indian national's approximate wait time for an EB-5 Visa is two years while the wait time for an Indian national seeking an EB-2 visa is ten years. Because of such disparities, Indian nationals are more frequently turning to EB-5 Visas to pursue an immigrant visa.

EB-5 *Visa Program*

43. Congress created EB-5 Visas to create jobs: As part of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, Congress established the EB-5 immigrant visa classification to incentivize employment creation in the United States." Final Rule, 84 Fed. Reg. 35750, 35756 (Jul. 24, 2019).

44. The EB-5 program accords lawful permanent resident status to "foreign nationals who invest at least $1 million in a new commercial enterprise (NCE) that will create at least 10 full-time jobs in the United States." *Id.*

45. To encourage investment in depressed geographic locations, the Agency defined a qualifying investment in certain targeted employment areas to be $500,000. 8 C.F.R. § 204.6(f)(2).

46. In 1992, Congress created the Regional Center Program, which allowed private companies to be approved by the Agency to pool EB-5 investment for larger projects. 84 Fed. Reg. at 35756. To encourage the pooling of investment to fund larger projects, the Agency allowed the investors to count both direct and indirect job creation. *Id.*

47. By investing in an approved Regional Center located in a Targeted Employment Area, a foreign national could invest $500,000 in a new commercial enterprise, create a total of 10 direct and indirect jobs, maintain the necessary rights of control over the project, and then acquire lawful permanent residency through the investment.

48. Currently, the Agency reports that it takes 27.5 to 46.5 months to make a decision on a single EB-5 Visa Petition. USCIS Processing Times.[2]

49. In 2016, the Agency reported that on average it took 6.5 hours to adjudicate an EB-5 Visa Petition. *See* Proposed Rule, 81 Fed. Reg. 26904, 26925 (May 4, 2016).

50. During the first quarter of fiscal year 2019, the Agency decided 2573 EB-5 Visa Petitions. Number of Form I-526, Immigrant Petition by Alien Entrepreneur by Case Status, Fiscal Year, and Quarter, Fiscal Years 2008-2019 (Fiscal Year 2019, Quarter 2) (June 26, 2019).[3]

51. During the second quarter of fiscal year 2019, the Agency decided only 975 EB-5 Visa Petitions.

52. This is not the result of an increase in petitions. Rather, the number of new petitions dropped by more than 60% and the number of pending petitions remained nearly the same.

53. During the fiscal year 2018, the Agency on average decided 3781 EB-5 Visa Petitions per quarter. *See* Number of Form I-526, Immigrant Petition by Alien Entrepreneur, by Fiscal Year, quarter, and case status 2008-2018 (Feb. 27, 2019).[4]

54. The foreign national must maintain the investment in the new commercial enterprise for the duration of the adjudication of the EB-5 Visa Petition. Once that is approved, two years later,

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[2] Available at https://egov.uscis.gov/processing-times/ (click on "Form" drop down box and select "I-526"; then click on "Field Office or Service Center" drop down box and select "Immigrant Investor Program Office.") (last visited Sep. 10, 2019).

[3] Available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2019_qtr2.pdf (last visited Sep. 10, 2019).

[4] Available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Employment-based/I526_performancedata_fy2018_qtr4.pdf (last visited Sep. 10, 2019).

the investor must again apply to the Agency to remove a condition on his or her status. Finally, after that decision is made, if the foreign national so chooses, he or she may withdraw their investment. 84 Fed. Reg. at 35756.

55. The investor's capital is tied up in the commercial enterprise until the Agency approves the entirety of the EB-5 Visa process.

56. Investors pay $3,675 to apply for an EB-5 Visa.

FACTS

57. Vishakh is an Indian national.

58. He first lived in the United States as a child in 1990 while his mother pursued a SPURS fellowship at MIT. He subsequently traveled to the United States to study at the University of California, Irvine.

59. After acquiring a bachelor's degree in computer science, he acquired a master's degree in computer science from Columbia University.

60. From 2007 to 2017, he worked for a major investment bank running multi-region data services and user interfaces for the firm's strategic risk platform.

61. During this period of time, Vishakh's prior employer successfully applied for an H-1B Visa for him and an extension.

62. Given the nature of his duties, the Agency approved H-1B Visas for Vishakh.

63. In 2014, in fact, the Agency approved an EB-2 Visa on behalf of Vishakh because his job required at least a master's degree. *See* 8 U.S.C. § 1153(e)(2).

64. Based on his approved EB-2 Visa and AC21, Vishakh could acquire as many H-1B Visa extensions as necessary to await the availability of an EB-2 visa. The wait as mentioned above was at least 10 years.

65. In an attempt to acquire an immigrant visa faster, Vishakh filed for an EB-5 Visa on July 21, 2017. He invested at least $500,000 in a regional center located in a targeted employment area and his investment directly and indirectly created at least 10 jobs.

66. Vishakh was investor number 73 in that particular regional center.

67. The Agency has yet to make a decision or issue a request for evidence on Vishakh's EB-5 Visa petition.

68. However, the Agency has already approved EB-5 Visa petitions for investor numbers 74-85 in the very same regional center project with nearly identical investments and job creation. Those later petitions were all pending on average a year.

69. The Agency must be treating Vishakh's application differently, otherwise, it would already be granted.

70. After filing his EB-5 Visa Petition, Cryptonomic applied for an H-1B Visa for Vishakh. Under the portability provisions of AC21, Cryptonomic can apply for a transfer for Vishakh and he can begin working for the new employer immediately while the H-1B Visa is pending.

71. Cryptonomic filed an H-1B Visa transfer application on November 20, 2017. The Agency assigned it receipt number EAC1803652840.

72. At the time, Cryptonomic was a startup decentralized network infrastructure company, focused on developing software to allow people to interact with popular blockchain platforms.

73. On its H-1B Visa application, Cryptonomic identified the position that Vishakh would fill as lead application developer. At the time, Cryptonomic had three employees, including Vishakh.

74. On the underlying Labor Condition Application, Cryptonomic identified the standard occupational code 15-1199.00 for "Computer Occupations, all other."

75. Cryptonomic describe the position as a Wage Level IV position in the labor condition application.

76. Wave Level IV positions are only appropriate for positions that require experience and advanced skills:

> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities

ETA, Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs at 7 (Rev. Nov. 2009).[5]

77. In its letter of support, Cryptonomic identified the more specific standard occupation code as 15-1199.09 for "Information Technology Project Managers."

78. The Department of Labor's "O*Net Online" describes the eligibility criteria for such position as: "Most of these occupations require a four-year bachelor's degree, but some do not." It then reports that at least 57% of respondents in this position had a bachelor's degree or a post-baccalaureate certificate. Summary Report for 15-1199.09 - Information Technology Project Managers.[6]

79. On January 19, 2019—more than 13 months after Cryptonomic filed the H-1B Visa petition—the Agency requested additional evidence.

80. Cryptonomic timely responded with additional evidence.

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[5] Available at https://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (last visited Sep. 10, 2019).
[6] Available at https://www.onetonline.org/link/summary/15-1199.09 (last visited Sep. 10, 2019).

81. On August 8, 2019, the Agency denied Cryptonomic's H-1B Visa Petition because, *inter alia*, Cryptonomic's position of lead application developer did not require a college degree.

82. The Agency wholly ignored Cryptonomic's reference to SOC Code 15-1199.09, its designation of its position as a Wage Level IV position, and the detailed duties required by Cryptonomic.

83. Similarly, the Agency arbitrarily discounted letters from comparable companies that require at least a bachelor's degree in computer science for a lead application developer.

84. The Agency also applied its "one degree rule" throughout the decision, unlawfully requiring evidence that a position can only be a specialty occupation if it requires one specific degree.

85. The Agency also improperly refuses to consider Vishakh's subordinates' resumes to determine whether Cryptonomic normally hires employees with college degrees in computer science for its lead application developer because Vishakh's subordinates were hired after him and after the initial H-1B Visa petition was filed.

86. The Agency's H-1B Visa denial repeats itself, ignores record evidence, and contains logical inconsistencies.

87. Based on the Agency's H-1B Visa denial, Vishakh has now lost his immigration status in the United States and his work authorization.

88. Based on the Agency's EB-5 Visa delay, Vishakh has yet to be able to apply for adjustment of status to a lawful permanent resident.

89. This delay and this denial have aggrieved Vishakh and Cryptonomic, respectively.

FIRST CAUSE OF ACTION
(APA - H-1B Denial)

90. Cryptonomic re-alleges all facts above as though restated here.

91. The Agency's H-1B Denial is a final agency action that aggrieved Cryptonomic. 5 U.S.C. § 704.

92. The Agency's H-1B Visa Denial is arbitrary and capricious under § 706(2)(A).

93. A final agency action is arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

94. The Agency's H-1B Visa Denial is arbitrary and capricious because:

a. First, the denial ignores the reference to SOC Code 15-1199.09 that indicates "most" jobs in that category require a college degree;

b. Second, the denial ignores Cryptonomic's designation of the position as a Wage Level IV on its labor condition application, indicating the position requires applicants at the very highest end of the education and experience spectrum for a particular SOC Code;

c. Third, the denial wholly discounts credible letters indicating it is industry practice to require at least a bachelor's degree in computer science for a position of lead application developer;

d. Fourth, the denial ignores the specific job duties, examples of work product, and nature of the work required by the lead application developer to determine the

position is not complex or unique enough to require a bachelor's degree in computer science;

e. Fifth, the denial relies on the Agency's "one degree rule," which is an unlawful interpretation of the relevant statutes and regulations;

f. Sixth, the denial unlawfully ignores that Cryptonomic "normally" requires a college degree in computer science for this position as all of Vishakh's subordinate employees have at least a college degree in computer science;

g. Seventh, the denial ignores significant record evidence by finding there is insufficient detail to determine that the knowledge required to perform the specified duties requires a college degree in computer science;

h. Eighth, the denial considered factors that Congress did not intend it to consider because it took more than 13 months to adjudicate;

i. Ninth, the denial lacks any expertise as the adjudicators have no specialized knowledge of the necessary background to lead a team of professionals to develop blockchain products in a decentralized network infrastructure company; and

j. Finally, Cryptonomic reserves the right to assert additional legal claims against the H-1B Visa Denial upon review of the certified administrative record.

95. The Agency's Visa Petition Denial is not substantially justified.

SECOND CAUSE OF ACTION
(APA - EB-5 Unreasonable Delay)

96. Vishakh re-alleges all allegations herein as though restated here.

97. The Agency has a duty to make a decision on his EB-5 Visa Application within a "reasonable time." 5 U.S.C. § 555(b).

98. 26-months is not a reasonable amount of time to adjudicate Vishakh's EB-5 Visa application because, if the Agency had timely adjudicated and approved his petition, his priority date would be current and he could apply for adjustment of status to a conditional permanent resident status. But for the unreasonable delay, Vishakh could immediately apply for adjustment of status, prevent the accrual of unlawful presence, and acquire conditional lawful permanent residency through his EB-5 Visa petition.

99. Courts often use the factors laid out in *Telecommunications Research & Action Ctr. v. FCC ("TRAC")*, 750 F.2d 70 (D.C. Cir. 1984) to determine whether agency delays are reasonable under the APA. Those factors comprise:

> (1) "the time an agency takes to make a decision should be governed by a 'rule of reason' "; (2) "[t]he content of a rule of reason can sometimes be supplied by a congressional indication of the speed at which the agency should act"; (3) "the reasonableness of a delay will differ based on the nature of the regulation; that is, an unreasonable delay on a matter affecting human health and welfare might be reasonable in the sphere of economic regulation"; (4) "the effect of expediting delayed actions on agency activity of a higher or competing priority . . . [and] the extent of the interests prejudiced by the delay"; and (5) "a finding of unreasonableness does not require a finding of impropriety by the agency."

Id. at 80. Each of these factors favors a finding that the Agency's delay is unreasonable.

100. First, the Agency is not applying its rule of reason—first in, first out—because it has taken more than 26 months to adjudicate his application. The Agency had made final decisions on EB-5 Visa petitions filed after Vishakh's for the same EB-5 Regional Center Project. If the Agency was applying a first in, first out rule, the Agency would have already adjudicated Vishakh's application.

101. Second, Congress has indicated that all immigrant visa petitions should be decided within 180 days. 8 U.S.C. § 1571(b).

102. Congress has also expressed an intent to ensure American companies have no gaps in employment for key foreign national workers. Such intent is apparent in both the American

Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Public Law 105-277, div. C., tit. IV, 112 Stat. 2681 (1998), and the American Competitiveness in the Twenty-First Century Act of 2000, Public Law 1-6-131, 114 Stat. 1251, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273,116 Stat. 1758 (2002) ("AC21"). *See Sakthivel v. Cissna*, No. 18-3194, slip op. at 15-22 (D.S.C. Jul. 30, 2019).

103. Third, this is health and welfare regulation, not an economic regulation as it determines whether the beneficiary can remain and live in the United States. Without a decision, the beneficiary will be unable to plan for the future, obtain an immigrant visa, or plan to live a normal life. Even with a denial, the beneficiary would have time to prepare to leave the United States or seek additional status.

104. Fourth, expediting a decision would have no impact on competing priorities because it only takes the Agency six hours and fifty minutes on average to decide an appeal. *See* Proposed Rule, U.S. Citizenship and Immigration Services Fee Schedule, 81 Fed. Reg. 26904, 26925 (May 4, 2016).

105. Similarly, the Agency has already decided EB-5 Applications that post-date Vishakh's application. Thus, it would not push Vishakh to the front of the "line," as he is apparently already there, though the Agency refuses to act on his application.

106. The Agency is in fact treating Vishakh differently than similarly situated EB-5 Applicants because it has adjudicated applications that post-date his.

107. Further, the prejudice to Vishakh outweighs any harm to the Agency from expediting a decision because Vishakh will be unable to apply to adjust status until there is a decision. And with the recent arbitrary denial of his H-1B Visa, the effects of this unreasonable delay become even more nefarious.

108. Finally, there is no need to find Agency impropriety in order to compel them to make a decision.

109. The Agency's 26-month delay is unreasonable on the facts of this case and such analysis requires an in-depth assessment of the unique facts of this case to determine whether the Agency can demonstrate that such delay is reasonable.

110. The delay is substantially unjustified.

CLAIM FOR EQUAL ACCESS TO JUSTICE ACT FEES

111. Plaintiffs re-allege all allegations contained herein.

112. The Agency's H-1B Denial is substantially unjustified under the APA.

113. The Agency's delay on Vishakh's EB-5 Visa is substantially unjustified under the APA.

114. Plaintiffs' net worth is less than the statutory cap, and Plaintiffs otherwise qualify for fees under the Equal Access to Justice Act.

115. Plaintiffs are entitled to reasonable attorney's fees under the Equal Access to Justice Act.

PRAYER FOR RELIEF

Plaintiffs pray that this Court will:

116. Enter an order setting aside the Agency's denial of Cryptonomic's H-1B Visa petition on behalf of Vishakh;

117. Enter an order compelling adjudication of Vishakh's EB-5 visa within 14 days;

118. Order USCIS to pay reasonable attorney's fees; and

119. Enter and issue other relief that this Court deems just and proper.

September 11, 2019

Respectfully Submitted,

s/Bradley B. Banias
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Application for Pro Hac Vice Pending

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